Likewise, NATOA bases its view that both basic and non-basic equipment should be regulated at actual cost on the fact that the language of the 1992 Cable Act was changed to equipment "used" to receive basic service from equipment "necessary" for the receipt of basic service.[116] The New Jersey Board takes a similar view, without giving any reason.[117] However, as Time Warner pointed out in its Comments, the change was made to mirror the equipment language in the 1992 Cable Act's "cable programming service" definition, which also speaks in terms of equipment "used" to provide cable programming service, and to give the Commission greater flexibility. There is no indication in the legislative history that this language change was intended to direct the Commission to subject equipment capable of receiving both basic and non-basic services to the more restrictive test for basic-only equipment.[118]

The Commission must consider several uncontroverted facts. First, subscribers who buy tiers of cable programming will also buy basic.[119] Second, cable operators do not and have not provided separate equipment to a subscriber used exclusively to receive non-basic tiers while the basic service is received by that subscriber through a separate piece of equipment. Such a

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[116] NATOA at 47-48.

[117] New Jersey Board of Regulatory Commissioners at 23-24.

[118] Time Warner at 50-51.

[119] Indeed, some commenters have argued that § 623(b)(7)(A) requires this purchase.

configuration would be decidedly consumer unfriendly. If Congress intended to apply the "actual cost basis" test to all equipment simply because such equipment allows the required basic service to be received by subscribers, Congress would not have simply substituted "used" in place of "necessary" in Section 623(b)(3)(A). Rather, it would have eliminated the phrase "to receive basic service" from that section and it would not have included installation and equipment used for non-basic service in the definition of "cable programming service" subject to bad actor review pursuant to Section 623(c).

Similarly, as Time Warner explained in its Comments, Section 623(b)(3)(A), which requires pricing based on actual cost for equipment used by basic-only subscribers to receive pay programming under the buy-through clause,[120] would be superfluous if Congress had intended all equipment to be priced based on actual cost.[121]

B. Equipment Rates Should Be Deregulated Where Competition From Independent Suppliers Exists

Time Warner's Comments advocated an "effective competition" test for basic equipment, installations, and additional outlets ("AOs") whereby such rates would be deregulated where the cable operator certifies and advises subscribers that such equipment is available for sale or lease from third parties.[122] There

120 Communications Act § 623(b)(3)(A)(2).

121 Time Warner at 64-65.

122 Id. at 56-58.

appears to be little opposition to Time Warner's proposal. In fact, Comments of parties on all sides of the issue can be read to support Time Warner's position. Specifically, various parties stated that subscribers have the right to purchase equipment from other sources, and some parties called for the Commission to require cable operators to inform subscribers of their right and ability to do so.[123] These parties obviously recognize that in many instances, "effective competition" exists in the market for equipment -- there would be no reason to request the notification to subscribers of independent equipment sources unless such sources actually existed. Thus, Time Warner would have no objection to a requirement that cable operators inform subscribers of their right to purchase or lease equipment, installations, or AOs from independent sources, as long as such requirement was part of a standard that deregulates the rates for such equipment and services where they are found to be subject to "effective competition." There is simply no rational basis to regulate rental prices for equipment supplied by a cable operator in any instance where consumers are free to purchase or lease equivalent equipment from third party vendors.

[123] See, e.g., City of Austin, TX et al. at 56; City of Thousand Oaks, CA at 23.

C. Cable Operators Should Be Permitted To Bundle the Marketing Of Various Equipment Components

As Time Warner explained in its Comments, there is no evidence in the 1992 Cable Act or its legislative history that Congress intended to unbundle rates for various equipment components, such as converters and remotes, or installations and AOs, under either the basic or non-basic test.[124] The Commission, however, appears to take a contrary view, at least regarding the bundling of equipment and installations.[125] Some commenters agreed with the Commission on this point.[126] This overbroad view of bundling misreads the 1992 Cable Act. For example, NATOA correctly observes that the statute regulates installation and equipment under a single standard, but then curiously states that such standard requires installations and equipment to be priced separately.[127] Such a conclusion has no foundation in the 1992 Cable Act. Even the Commission's Notice recognizes that the statute does not mandate unbundling of installation from the lease of equipment -- the Commission merely takes the preliminary view that such practice should be encouraged to increase competition in the market for equipment and installations.[128]

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124 Time Warner at 59.

125 Notice at ¶ 63.

126 See, e.g., City of Austin, TX et al. at 55; NATOA at 46.

127 NATOA at 46.

128 Notice at ¶ 63.

As a policy matter, the Commission's view that unbundling of equipment and installations would lead to increased competition is purely speculative. As Time Warner pointed out and as other commenters agreed, a competitive market already exists in this area, and there is no evidence that its development is being hindered by cable operator equipment marketing methods.[129] For instance, as NCTA recognizes, "[e]lectronics stores vigorously advertise the availability of 'universal remotes,' which can be used not only with cable television converter boxes but also with video cassette recorders, audio equipment and other electronic devices."[130]

As we explained, moreover, different equipment components are often treated as one functional unit (such as a converter coupled with a remote), whereby one component is useless without the other.[131] Mandatory unbundling of converters and remotes makes no more sense than requiring cordless phone handsets to be sold separately from the base unit. Furthermore, certain equipment components are logically marketed together. For example, the most (or at least the first) logical time to discuss connecting additional equipment or AOs in a household occurs when the cable operator is marketing the initial installation to the subscriber. Where the statute and legislative history do not prohibit bundling of different equipment components, and where

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[129] Adelphia at 81-82; NCTA at 46; Time Warner at 64.

[130] NCTA at 46.

[131] Time Warner at 59.

the Commission's goal of a competitive market is already being achieved, the Commission should not interfere with logical and legitimate cable operator marketing practices.

D. Cable Operator Charges For Installations, Equipment, AOs, and Service Calls Should Be Evaluated in a Single Equipment "Pool"

As is the case with marketing various equipment components in a bundle, Time Warner also explained in its Comments that cable operator charges for basic equipment, installation, service calls, and AOs should be evaluated in a single equipment "pool," separate from basic cable programming service. The entire equipment pool, instead of each individual equipment component, should be subject to the statute's rate regulation standards.[132] This pooling concept is entirely different from bundling of equipment and installations, or other equipment components. Whether or not various equipment components are marketed in a bundled fashion, the overall charges for such equipment components should be viewed as a whole when being scrutinized for reasonableness. As the Notice recognized, cable operators typically price some equipment components, such as installations, below cost.[133] This type of pricing increases penetration by attracting subscribers who might not otherwise subscribe because they would be deterred if installations were priced at the operator's full cost.[134] Accordingly, cable operators should be

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[132] Id. at 65.

[133] Notice at ¶ 70.

[134] Time Warner at 65.

able to continue charging below cost for installations, and should be able to make up for the loss by charging above cost for other equipment components, so long as the overall equipment "pool" rate meets the appropriate benchmark. Otherwise, penetration would decline, and the operator would have to raise all rates because its costs would be spread over fewer subscribers. As Time Warner explained in its Comments, such a "pool" approach is permitted by the 1992 Cable Act, and would be fair to consumers so long as their overall cable bill was reasonable, regardless of the mix of individual equipment charges.[135]

V. PROVISIONS APPLICABLE TO CABLE SERVICES GENERALLY

A. Geographically Uniform Rate Structure and Discrimination

Section 623 should not be applied in a manner that injures consumers by limiting the cable operator's ability to tailor its pricing to various competitive environments. As Time Warner pointed out in its initial comments, the plain meaning of Section 623(d) requires only that cable operators establish uniform rate structures, not rate levels, across the relevant geographical area.[136] In other words, the categories or components of the total rate charged must be uniform, but the various rate levels within each of these components or categories need not be identical. Most comments misconstrued the uniform rate structure

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135 Id.

136 Id. at 68-69.

requirement as mandating identical rate levels across the applicable geographical area.[137] The Commission must take cognizance of these misinterpretations when considering the proposals of these commenters on the uniform rate structure requirements.

In its Comments on uniform rate structure requirements, Time Warner argued three main propositions: (1) that any geographic rate uniformity (either in level or structure) imposed on a cable system serving more than one franchise territory should accommodate differences in governmentally imposed costs between the territories, (2) cable operators should be free to negotiate individual contracts with multiple unit dwelling ("MDU")[138] owners, and (3) a cable operator should be free to meet the price of a rival that elects to contest less than all of a cable operator's franchised territory.

Most thoughtful commenters, regardless of whether they were cable operators or regulators, agreed with Time Warner's first proposition -- that cost differences between franchises should be recognized even when different franchise territories are served

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[137] See, e.g., City of St. Petersburg, Florida at 3; Liberty at 2-13; New York State Cable Commission at 10, 17.

[138] By "MDU," Time Warner means to include not only rental apartment buildings, but also condominiums, trailer parks, and so-called "private communities," all of which traditionally have been served by SMATV and MMDS as well as by cable. The common element in these situations is that either the landlord, the developer, or the homeowners' association often negotiates directly with the multichannel provider for the right to provide or to offer service to all residents.

by a single technically integrated cable system. Indeed, NATOA went so far as to say:

> [T]he requirement [of Section 623 (d)] should not be interpreted to mean that the rate structure should be the same in each franchise area served by a cable system that serves multiple, contiguous franchise areas; the provision only requires that the rate structure <u>within</u> a franchise area be "uniform."[139]

Thus, the territory defined by the franchise -- not the territory defined by the physical reach of a cable system -- should be the fundamental geographic unit of cable rate regulation under the 1992 Cable Act.[140]

Consumers who live in MDUs will suffer unless Section 623(d) is interpreted to allow cable operators the freedom to offer volume discounts or other individually negotiated contracts. As Time Warner cautioned in its initial comments, the rate discrimination provisions of Section 623(d) and (e) should not bar the use of volume discounts. Given that a SMATV or MMDS operator negotiates individually with each MDU owner, there is no reason for the cable operator not to have the same ability. This necessarily implies that the cable operator must be able to offer a volume discount to reflect the fact that it is negotiating for

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139 NATOA at 79 - 80 (emphasis in original).

140 Thirteen cities ranging in size from small (McKinney, Texas) to medium (St. Petersburg, Florida) represented by two law firms, filed Comments that, on the surface, seem to support rigid rate uniformity. <u>See</u>, <u>e.g.</u>, City of St. Petersburg, Florida at 29-30 and City of Miami Beach at 20-21. However, eleven of those thirteen cities recognized differences in cost as justification for different prices and thus, their position is not philosophically inconsistent with Time Warner's. <u>See</u>, <u>e.g.</u>, City of St. Petersburg, Florida at 20.

the right to serve a large number of customers. If the cable operator does not have the freedom to make an individually attractive proposal to the MDU owner at the time it is selecting a multichannel provider for MDU residents, those residents will pay the penalty of reduced competition by government fiat.

Finally, Time Warner believes that Section 623(d) should be interpreted to allow a cable operator to lower prices to meet competition in less than its entire franchised territory, in order to ensure that consumers in that area get the full benefit of competition. While even the Competitive Cable Association declined to address directly the issue of permitting a cable operator to meet a competitive price in less than all of its franchised territory, the Comments of two municipalities -- one that has overbuilt a private cable operator and one that is considering such an overbuild -- illustrate graphically the dangers to competition that will arise if Section 623(d) is applied in excess of its statutory bounds in any overbuild.

The Electric Board of the City of Glasgow, Kentucky decided to overbuild the incumbent privately owned cable operator. Glasgow seeks to construe Section 623(d) to protect it from price competition from the incumbent, first to prevent the incumbent from reducing its price only in the overbuilt area and second, once the entire city was overbuilt, to prevent the incumbent from charging less in the city than in the surrounding county served by the same system.[141] Glasgow complains that, because it did not have this protection, it failed to achieve its projected 50% penetration because the incumbent had the temerity to cut its basic service price.[142] Consequently, the municipal system has attained only 25% penetration.[143] Not satisfied with an interpretation of Section 623(d) that would require the incumbent to have uniform prices in one system, Glasgow seeks price uniformity "at the very least, statewide."[144]

Similarly, the City of Manitowoc, Wisconsin, apparently considering a municipal overbuild, wants some assurance that the incumbent, privately owned cable operator will not be able to reduce prices in that City to meet competition without having to reduce prices elsewhere as well:

> [W]e are fearful that a narrow reading of the uniform rate requirement, which would limit uniform rates to a franchise area only, will enable our operator to engage in predatory pricing only in the City of Manitowoc, thus undercutting the City's efforts to fairly compete.[145]

In search of such price protection, Manitowoc seeks a rigidly uniform rate system-wide, regardless of cost differences between franchises.[146]

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141 The Electric Plant Board of the City of Glasgow, Kentucky at 3-4.

142 Id.

143 Id.

144 Id. at 4.

145 City of Manitowoc, Wisconsin at 5.

146 Id.

Clearly, consumers will not benefit if Section 623(d) is used to protect a competitor from price competition, a result both these municipal overbuild commenters seek. If consumers are to realize the benefits of competition between cable companies, the incumbent cable operator must be able to meet an overbuilder's price in the contested area, whether that area is only part of a franchised territory or is the entire territory that happens to be served by a system that serves other territories.[147] To the extent that any cable rival is the victim of <u>truly</u> anticompetitive practices, it is protected by remedies in existing state and federal antitrust and trade regulation statutes.[148]

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[147] Indeed, according to Glasgow, the incumbent operator first lowered its price in the overbuilt area of the city until the municipal system was fully constructed. Interestingly, it also lowered its price (though not by as much) in the surrounding county, which is not overbuilt but is served by the same system. Electric Plant Board of the City of Glasgow at 3. Assuming that the incumbent system as a whole is not now showing a loss, enforcement of Section 623(d) in the manner Glasgow seeks would force the incumbent to raise prices in the City to equal what it charges in the surrounding area. This, of course, would either cause customers to switch to the municipal system or would allow the municipal system to raise its prices without fear of losing customers to the incumbent. In any event, one thing is sure: if Section 623(d) is interpreted as Glasgow wishes, cable customers in the City will pay more.

[148] Ironically, if a privately owned cable operator is a victim of anticompetitive practices at the hands of a municipally owned cable operator, it appears that under the decisions of some courts (which Time Warner believes are wrong) the private operator does <u>not</u> have a remedy under either the federal antitrust laws, the First Amendment, or the Fourteenth Amendment. <u>See</u>, <u>e.g.</u>, <u>Paragould Cablevision v. City of Paragould</u>, 930 F.2d 1310 (8th Cir. 1991), <u>cert.</u> <u>denied</u>, ___ U.S. ___ (1992) <u>and</u> <u>Warner Cable Communications, Inc. v. City of Niceville</u>, 911 F.2d 634 (11th Cir. 1990), <u>cert.</u> <u>denied</u>, 111 S.Ct. 2839 (1991). <u>See</u> <u>also</u>, 47 U.S.C. § 555 A.

B. Negative Options

As Time Warner explained in its Comments, the 1992 Cable Act's negative option prohibition[149] is limited to situations where a subscriber is provided with and billed for a new programming package or service (including equipment) consisting entirely of services to which the subscriber did not already subscribe, without the subscriber's oral or written request.[150] The prohibition directly resulted from the marketing by a major cable operator of a new programming service not previously offered to subscribers on any tier, for which the cable operator had intended to bill subscribers unless they notified the cable operator to cancel the service.[151]

Some commenters, however, ignore the statutory language and background leading to the negative option provision, and seek to label a multitude of cable operator actions as negative options when they have no connection to the intent of the negative option prohibition. For instance, NATOA states that a negative option should be deemed to occur where:

> (1) the cable subscriber now pays more to receive on two tiers of service, programming that it previously could obtain on one tier, and (2) the cable operator creates two tiers from one tier of service and forces all subscribers to take the

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149 Communications Act § 623(f).

150 Time Warner at 80.

151 Id. at 79. See 138 Cong. Rec. S. 14248 (Sept. 21, 1992) (statement of Sen. Gorton); Cole, Raywid at 51; TCI at 64-65.

> more expensive tier, while making the less expensive tier an optional service.[152]

While NATOA's second example is ambiguous to say the least, it is clear that neither NATOA example is a negative option since there is no new programming service being offered separately from a service tier previously taken by the subscribers. Both are examples of rearranging or repackaging services through the establishment of a second tier of service, both could be implicit rate increases subject to rate regulation, and the second example could conceivably be subject to the evasion prohibitions depending on what situation NATOA is depicting.[153] However, neither example contains the fundamental element necessary for a negative option -- the introduction of an entirely <u>new programming service</u> separately offered, or a tier of new programming services not previously provided to, or requested by, the subscriber.

Similarly, CFA confuses rate increases with negative options. In successive sentences in its comments, CFA first states that "Congress' intent was to protect consumers from paying for <u>services</u> they did not affirmatively request," then immediately states that "[i]t was <u>price increases</u> that most concerned Congress."[154] Accordingly, CFA states that tier splitting accompanied by a price increase, without prior notice,

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152 NATOA at 86 (emphasis added).

153 Communications Act § 623(h).

154 CFA at 158.

violates the 1992 Cable Act's negative option prohibition.[155] While it may be true that Congress was concerned with price increases when enacting the 1992 Cable Act's rate regulation provisions, negative options involve unrequested programming services, not merely unwanted rate increases (which of course are regulated under other provisions of the statute, such as the rate regulation provisions and, under limited circumstances, the prohibition against evasions). Therefore, CFA's examples simply do not raise the specter of negative options.

City of Austin, TX et al. have an even broader view of negative options. They argue that "all tiering changes," including instances where cable operators retier and simultaneously raise rates, and even revenue neutral tier changes, are negative options.[156] Again, retiering accompanied by a rate increase is likely subject to rate regulation scrutiny, but it has no connection to the negative option prohibition. Revenue neutral tier realignments, without question, do not trigger the 1992 Cable Act provisions relating to rate regulation, evasions, or negative options. Certainly, the subscriber has not been harmed by a revenue neutral retiering -- there has been no rate increase (and thus no evasion of the statute's rate regulation provisions), and no new programming service delivered which has not been previously received. This

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[155] Id. at 159. Unlike some other commenters, CFA at least recognizes that revenue neutral retiering would not be a negative option. Id.

[156] City of Austin, TX et al. at 69-70.

is merely an example of simple retiering. As the Commission has stated, the 1992 Cable Act clearly permits retiering, and indeed in some cases retiering may be necessary under the law.[157] The statute cannot be read to find that retiering is necessary or permitted under several provisions, but that such retiering automatically violates the statute's negative option prohibition. Additionally, the legislative history to the 1992 Cable Act's negative option prohibition makes clear that "[t]his provision is not intended to apply to changes in the mix of programming services that are included in various tiers of cable service."[158] Cable operators are thus free to add or delete services to or from a tier without triggering the negative option prohibition.

Accordingly, the Commission must clarify that, while certain types of retiering, especially when accompanied by rate increases, may trigger the 1992 Cable Act's rate regulation provisions, the statute's negative option prohibition is simply not a catch-all designed to cover every change by a cable operator of its service offerings. The ban on negative options was enacted specifically to deal with the limited situation of the introduction of, and billing for, a new cable programming service (or equipment) separately offered or a new service tier not previously subscribed to, without prior consent.

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157 Notice at ¶ 127.

158 Conference Report at 65. See also, Notice at ¶ 118.

C. Collection of Information and Reports on Average Prices

Some commenters addressed the issue of collection of information for the purpose of administering and enforcing the Commission's rate regulation rules. Several of these commenters agree with Time Warner that, if the Commission adopts a benchmark approach to rate regulation (and there is widespread support for a benchmark approach), there is no need to collect any cost of service information.[159] If there is no need to collect cost of service data, then none should be collected because Congress explicitly intended for the Commission to collect only that financial information that is "necessary to administer and enforce" rate regulation,[160] and to minimize the burdens on cable operators and franchising authorities.[161]

USTA contends that the cost data requested in Appendix A to the Notice is data that the Commission needs from systems of more than one thousand subscribers "whether or not the Commission adopts a benchmark or cost of service alternative."[162] Time Warner disagrees -- cost data is simply unnecessary for a benchmark approach to regulation, and the Commission, therefore, should not waste time and effort in gathering and maintaining

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[159] See, e.g., Comcast Corp. at 64; NARUC at 6.

[160] House Report at 88. See also Communications Act § 623(g); Time Warner at 86 & n. 199. But see City of Austin, TX et al. at 72 (Commission should collect revenue information and cost of service information).

[161] See Communications Act § 623(b)(2)(A).

[162] USTA at 15.

such information.[163] Moreover, cost data may be competitively sensitive and, therefore, not proper for public disclosure. Collection of such competitively sensitive information raises confidentiality concerns and creates an added administrative burden because such information must be screened from all publicly available records.[164]

While the collection of cost information is wholly inappropriate, the collection of revenue information such as that requested on the forms sent to selected systems on December 23, 1992 appears to be reasonably targeted to implementation of a benchmark rate approach.[165] Revenue information is necessary for administration and enforcement of a benchmark approach to regulation, and does not raise the same level of concern regarding disclosure because it is less competitively sensitive.

Time Warner reiterates its assertion that the Commission's collection of information rules should be tailored to exclude

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[163] A clear distinction should be drawn between information required to be submitted annually by cable operators pursuant to Section 623(g) of the Communications Act, which should be no greater than absolutely necessary to implement the Commission's rate regulatory scheme, and information which a cable operator voluntarily submits in an effort to justify a rate which may fall outside the applicable benchmark. In this latter case, the scope of the information submitted is entirely within the discretion of the cable operator.

[164] Congress specifically directed the Commission to seek to reduce the administrative burdens on the Commission as well as on cable operators, subscribers, and franchising authorities. Communications Act § 623(b)(2)(A). The Commission, therefore, should not implement rules that it knows will create added administrative burdens on itself and other entities as well.

[165] See NARUC at 6.

public companies that are already required to file financial information for public disclosure. The Commission should also not rush to finalize its collection of information forms in the present proceeding, but should address the forms specifically in a further proceeding following implementation of the rate regulations that are the subject of this rulemaking so that the forms are no more comprehensive or burdensome than absolutely necessary for the effective administration of rate regulation.[166]

D. Evasions

As Time Warner explained in its Comments, the 1992 Cable Act's prohibition against "evasions" of the statute's rate regulation section[167] is not meant to prohibit retiering generally, or rate increases not accompanied by "evasive" behavior (e.g., removing services from a tier).[168] Retiering and service rearrangement is not prohibited by the new law and, indeed, it is expressly authorized in a number of instances. Rather, a proper reading of the statute and its legislative history confirms that evasions are limited to unreasonable implicit rate increases which may result when cable operators retier services, split tiers, or take other actions which

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166 See Notice at ¶ 123.

167 Communications Act § 623(h).

168 Time Warner at 88-89.

decrease the number of channels to the subscriber without a sufficient corresponding rate adjustment.[169]

Some commenters completely miscast the intent of the "evasions" section, and seek to require the regulations against evasions to prohibit retiering, programming mix changes, and other legitimate cable operator practices, or to label all rate increases as "evasions." For example, NATOA mislabels as evasions the following practices: (1) rate increases for existing programming services "in anticipation of the Commission's rate regulations;" (2) retiering "to minimize the impact of rate regulation" (presumably by decreasing the number of services offered on basic before the 1992 Cable Act takes effect); and (3) "future retiering" (presumably meaning retiering after the rate provisions of the 1992 Cable Act take effect).[170] NATOA requests that the Commission permit franchising authorities to hold rate regulatory proceedings to review any of the above conduct, whereby the actions would be presumed evasions and the cable operator would bear the burden to demonstrate, by a preponderance of the evidence, "that its action was done predominantly for a legitimate business purpose unrelated to any evasive effect, and not done solely on grounds of enhancing revenue."[171]

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169 Id. at 89.

170 NATOA at 82-84.

171 Id. at 84.

There are several significant flaws with the NATOA approach to evasions. First, the burden to prove that a legitimate business practice is an evasion of rate regulation must not be imposed on the cable operator. If the conduct is not otherwise expressly prohibited by the statute or implementing Commission regulations, then the burden in a claim of evasion must be on the complainant. Second, operator conduct alleged to be an evasion cannot be based on the state of mind of the cable operator. The evasion section was not meant to entail a criminal intent determination or some form of psychological evaluation of the purpose of the operator's action. Thus, NATOA's criteria of evasion hinging on whether a legitimate rate increase pre-April, 1993 was "in anticipation" of new regulations or that otherwise appropriate retiering done "to minimize" rate regulation was unintended by Congress,[172] is unfair to the cable operator and will be unworkable for the Commission.

Finally, NATOA's definition of evasion is in direct conflict with numerous other provisions of both the 1984 Cable Act and the 1992 Cable Act. For example, the labeling of either pre-April, 1993 or future retiering as an evasion directly conflicts with (1) Section 624(b)(1) of the 1984 Cable Act, which prevents a franchising authority after 1984 from establishing any requirements with respect to cable programming or other information services, and (2) Section 623(b)(7)(B), which expressly provides that any services added to the basic tier,

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172 Id. at 82-84.

beyond the statutory minimum requirements, are solely within the discretion of the cable operator. Moreover, the natural result -- indeed, perhaps the intended response -- of a low-priced basic tier requirement as defined by the new law is the retiering of non-required services off the basic tier.[173]

As the NATOA manifestations indicate, many cities, flush with the anticipation of rate regulation, are eager to take an extremely creative view (which bears no relation to practicality or fairness) of the 1992 Cable Act's evasion provisions. Accordingly, the Commission must clarify the limits of this prohibition. Without having to list every hypothetical situation, the Commission must nevertheless articulate the narrow scope of evasions in clear principles. First, retiering itself is not an evasion. Cable operators have a fundamental right to retier.[174] As mentioned above and as the Notice recognizes, the 1992 Cable Act may, indeed, make it necessary for an operator to retier in certain cases.[175] As explained in Time Warner's discussion of negative options, it would be an absurd reading of the statute to claim that retiering is necessary or permitted under numerous sections of the law but outlawed under the general evasions section. Rather, the evasions clause merely assures

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[173] See Notice at ¶ 127.

[174] See In re Community Cable TV, Inc., 95 F.C.C.2d 1204 (1983), recon. denied, 98 F.C.C.2d 1180 (1984); Conference Report at 65 (specifically allowing "changes in the mix of programming services that are included in various tiers of cable service").

[175] See Notice at ¶ 127.

that the rate which results from retiering may be scrutinized under the applicable basic or non-basic standard ultimately adopted by the Commission.

Second, explicit rate increases subject to the Commission's rate standards, while potentially unreasonable, are not evasions. As NATOA acknowledges, rate increases are subject to scrutiny under the statute's rate regulation provisions, including the basic rate standards and complaints regarding unreasonable cable programming service rates, etc.[176] Applying the evasions prohibition to rate increases would thus be completely redundant. Rather, an evasion may be found only in conduct that attempts to avoid rate regulation scrutiny after the effective date of the new Commission regulations.

The obvious example is where a cable operator removes services from a tier but keeps the rate the same, and claims that there has been no rate increase merely because the amount has not changed even though the number of channels offered has been reduced. Take, for example, a cable system under a benchmark approach whose basic rate benchmark is $1.00 per channel, and the system currently offers 13 basic channels for $13.00, thus meeting the benchmark. If the cable operator removes two channels from basic and decreases the rate by $1.00, an evasion may have occurred, because the resulting basic service now has 11 channels for $12.00, or $1.09 per channel, in excess of the $1.00 per channel benchmark. Thus, the evasion section is designed to

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[176] NATOA at n. 39.

assure that this revised basic service will be subject to rate scrutiny.

On the other hand, if the cable operator retains the same level of services and simply raises the rate to $14.00, the explicit rate increase is fully subject to regulation (assuming the system is not subject to effective competition). Obviously, this example cannot be labeled an "evasion" of the statute's rate regulation provisions. There is simply no conduct in this second example designed to evade rate regulation -- the cable operator's action will be fully exposed to regulatory scrutiny.

The third principle that the Commission should articulate in clarifying the limits of the evasions prohibition is that it is not retroactive. Some commenters claim, for example, that all retiering undertaken after the enactment of the 1992 Cable Act is somehow an illegal "evasion" which can be required to be undone.[177] However, the statute clearly states that the Commission is to establish regulations to prevent evasions within 180 days of enactment.[178] Congress could have specified that regulations be promulgated sooner, as it did with other sections of the 1992 Cable Act, such as antitrafficking[179] and municipal ownership[180] (both effective 60 days after enactment), but it did not do so.

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177 See, e.g., City of Austin, TX et al. at 73-75.

178 Communications Act § 623(h).

179 Id. § 617.

180 Id. § 621(f).

Therefore, actions taken by cable operators before April 3, 1993 cannot be considered evasions. Of course, the results of such actions would be fully covered by the statute's rate regulation provisions, so no premature level of scrutiny is required. For instance, if a cable operator retiered at any time prior to April 3, 1993, and the resulting rate for non-basic cable programming service falls outside the standards ultimately established by the Commission, subscribers will have the full 180 day period after the effective date of the rate regulations promulgated pursuant to the 1992 Cable Act to file a complaint. If the rate concerns basic service, it will be subject to the benchmark or other basic rate regulation on the effective date of the statute's rate regulation provisions. Therefore, consumers are protected without reading the evasions prohibition more broadly than Congress intended.

E. Grandfathering of Rate Agreements

The Notice addresses the grandfathering of rate regulation agreements entered into prior to July 1, 1990.[181] The Commission should adopt Time Warner's suggestion that all rate regulation agreements in effect upon implementation of these rules should be treated in the same manner -- they should be grandfathered.[182] Such a rule would be consistent with the legislative history and the plain language of the statute,[183] as

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181 Notice at ¶¶ 134-135; Communications Act § 623(j).

182 See Time Warner at 93.

183 See id. at n. 220.